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United States Supreme Court.

OCTOBER TERM, 1904.

No. 575.

EDWARD B. WHITNEY, as Trustee in bankruptcy, etc.,
Appellant,
against
CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, THE SECURITY WAREHOUSING CO., and U. S. MORTGAGE & TRUST CO.,
Appellees.

IN EQUITY.

THE SECURITY WAREHOUSING COMPANY'S BRIEF.

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Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 576.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as members of the firm of Dresser & Co.,

Appellant,

AGAINST

CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, SECURITY WAREHOUSING COMPANY and UNITED STATES MORTGAGE AND TRUST COMPANY,

Appellees.

In Equity.

BRIEF FOR THE SECURITY WAREHOUSING COMPANY, APPELLEE.

Statement.

The appellant's bill in equity indicates the actual fact, that no defendant thereto has received from Dresser & Co.'s estate a single dollar beyond the amount loaned that firm (more than six months prior to its bankruptcy) in good faith, as a current business

transaction; the security therefor, which the bill seeks to invalidate, being taken contemporaneously with the making of the loans, as the vital part of that transaction. (Rec. 3, top; ¶ 6.)

Thus sections 67*b* and 60*e* of the bankrupt act are eliminated from discussion.

Nor has section 90 of the New York law, quoted at the bottom of pages 4 and 5 of appellant's brief, any application; because our lease was filed as the law directed, and the bill does not claim it was not.

Prior to its issue of warehouse-receipts (Rec. 4, ¶ 10) the Security Warehousing Company took a lease of the premises in which were the goods pledged (*Id.* 3, ¶7.) There is no averment that this lease was not duly and properly recorded: no such statement could be made truthfully. It was so recorded; as is naturally inferable from the failure to state the contrary, or to make the lease an exhibit, as well as from the avowal that its purpose was to make those premises one of this defendant's storage-warehouses. (Ibid.) Its record must have been known to the mercantile agencies, and published in the law (and other) journals, according to the usual course of affairs. The warehouse-receipts themselves, intended to be negotiated for loans, as they actually were (*Id.* 4, ¶12.) refute all suggestions of "secret arrangement" (¶10) "concealment from unsecured creditors" (p. 3, ¶6), etc., argumentatively made as mere conclusions of the pleader and not as facts. Putting "the *nominal* rental" at a dollar a year was conformable to a usage so common as to be judicially noticed; the real consideration moving this defendant to take the lease obviously appearing elsewhere therein, and not stated by the complainant. Under its lease, this defendant did employ a custodian (12 Pick. 76; 96 U. S. 467) and did tag the goods (P. 3, ¶9). Whether tags are 'few' or numerous; or are 'small' or large, etc., are mere conclusions, in the absence of facts showing their number, size and position; and the same is true as to the statement (P. 4, ¶11) as to the character of the

receipts, the tenor of which is not given, nor one attached as an exhibit.

Manifestly, from the stated circumstance (P. 4, pars. 12 and 13) that this defendant itself held some of these receipts to secure loans to Dresser and Company (and, of course, was responsible to the other holders for the safekeeping of the pledged goods), there could be no design to omit such action as it considered necessary for the purpose of their retention as security. Whether this defendant acted wisely or not, it certainly acted *bona fide*. In the copious use of adjectives and imputations in the complaint the word "fraudulent" is not employed; nor any statement of facts which imply fraud, and are equivalent to the use of that term.

There is nothing in the bill which tends to impugn the strictest good faith on the part of any defendant other than the one we represent throughout the proceedings, from the time they made their loans to Dresser & Co. on the security of these receipts until they got their money back upon the surrender of those receipts to this defendant.

In order to protect these other receipt-holders as well as itself, the Security Warehousing Co., after Dresser & Co. were adjudicated, continued to retain possession of the pledged goods, the receivers in bankruptcy acquiescing in its just claim of right to do so; and to sell them to redeem the warehouse receipts; *and its other charges* (Rec. 5, 6; pars. 18 to 24 inclusive). Without so stating the pleader seems to assume argumentatively (Rec. 5, 6; pars. 21 to 24 and 29) that this defendant had no pledge of, or lien upon, these silks except to the extent it had issued negotiable warehouse receipts thereon. Such is not the case. From the moment goods are warehoused, there is a lien upon them for storage, advances, expenses and charges upon *all* the same owner's goods (N. Y. lien law, § 73; 121 N. Y. 393) to the extent of the claim and right given by the contract under which they are stored, whether warehouse receipts are ever issued against

them or not. What the contract between us and Dresser & Co. was, the bill does not show. Had the lease been made an exhibit, it would have appeared that, in everything which was done, we were acting strictly within our rights under our contract. (95 U. S. 764.) In its absence, it cannot be assumed that we were not doing so.

Van Heusen v. Radcliffe, 17 N. Y. 580.

The foregoing recitals, and comments upon the allegations of the bill, are made chiefly with reference to our proposition of law hereinafter discussed (*post*, p. 21) that, under section 70*e* of the bankrupt act, neither the United States District Court *nor any other tribunal* has jurisdiction to entertain a suit by a trustee in bankruptcy to recover property from a *bona fide* holder for value. To make out a case, the trustee must state *facts* showing a want of good faith, or the absence of a valuable consideration.

The purpose of the present bill controvenes the purpose of the exception found in section 70*e*. For the benefit of those dealing, for mercantile profit, with Dresser & Co. upon the general credit of that firm, the bill proposes to deprive the makers of cash loans, effected to aid the firm in carrying on its business and paying its debts and expenses (Rec. 3, par. 6) of the security taken for such loans. Sec. 70*e* gives no authority to the trustee to bring such a suit anywhere.

Statute.

The pertinent provision of section 70*e* of the bankrupt act reads:

"SECT. 70*e*. The trustee may avoid any transfer *by the bankrupt* of his property which any creditor of the bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, *unless* he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered, or its value collected, from whoever may have received it, EXCEPT *a bona fide*

holder for value. For the purpose of *such* recovery [*i. e.*, from one *not* "a *bona fide* holder for value"] any court of bankruptcy, and any state court which would have had jurisdiction, if bankruptcy had not intervened, shall have concurrent jurisdiction."

The last clause, conferring concurrent jurisdiction, was added by the amendatory law of Feb. 5, 1903.

LAW.

I

The issue.

The subject of investigation and determination by this court is that presented (in somewhat different phraseology) by the third question in the Bardes case (178 U. S. 526 top) whether the district court had power to "take jurisdiction over the suit *as it now stands upon the record?*"

This appeal (Rec. 18, fol. 33) is from the final decree entered Feb. 21, 1905, dismissing the bill "on the ground that this court has not jurisdiction to entertain this suit." (*Id.* 17, fol. 30.) This was the ground of demurrer. (*Id.* 14, fol. 25.)

The fifth section of the act of 1891, chap. 517, prescribes that "the question of jurisdiction *alone* shall be certified to the Supreme Court from the court below for decision." (26 Stats. 827 bottom.)

In his certificate, filed a week after the entry of final judgment, the judge states his dismissal of the bill to have been grounded upon lack of the defendants' consent. (Rec. 17, 18.) This, however, does not circumscribe the duty of this court, nor restrict us to that ground for sustaining the decree. The inquiry here is not whether the reason assigned by the judge is sound,

but whether the court's decree is justified by the record. The views of the judge stated in the certificate are no more controlling here than those expressed in the opinion.

Naturally, we believe he gives a valid reason for a correct conclusion; yet we also believe there were others, too, imperatively demanding the dismissal of the bill, even had the controversy been between citizens of different states; and we ask the court to scrutinize the entire record. *Ex gr.* if Mr. Whitney's appointment as trustee had not been stated, it would have been as fatal to the bill, under our demurrer, as the lack of defendant's consent; and so of every fact essential to jurisdiction. Every averment of any such fact is of equal importance.

II.

Jurisdiction, Generally.

As to courts of limited jurisdiction, "the fair presumption is that a cause is without its jurisdiction till the contrary appears." (4 Dallas, 12.)

"Such jurisdiction, or the facts upon which in legal intendment it rests, must be distinctly and positively averred in the pleadings, or should appear affirmatively and with equal distinctness in other parts of the record, it not being sufficient that jurisdiction may be inferred argumentatively."

Thomas v. Board, 195 U. S., 210 mid.
Peo. v. Spencer, 55 N. Y. 1, bottom.

As MORROW, C. J., says:—

"We are confronted at once with the presumption that the cause is without the jurisdiction, unless the contrary affirmatively appears," citing cases to show that "the court would infer or presume against jurisdiction, but not in its favor."

Fife v. Whittell, 102 Fed. R., 539, 540.

It becomes necessary, then, carefully to consider the statutory provisions of the Bankrupt Act of 1898 (as amended February 5, 1903) and to compare with them those statements of facts in the bill of complaint which a demurrer admits, to see if these make out a case so "specially circumstanced" (4 Dall., 11) as to bring it within the jurisdiction of the district court.

III.

Statutory Provisions.

Before taking up any section of the law, the course of the appellant's argument, and his citations lead us to premise that the inquiry does not relate to an exercise of the authority of the Court over an estate being administered in bankruptcy, but relates to the conditions which allow it jurisdiction over a plenary bill in equity. Sect. 23*a* makes this distinction. *In re* Gray, 47 App. Div., 557; 178 U. S. 532-3; and cases *passim*.

Section 23*b* allows the trustee to sue only in that forum in which the bankrupt (had he not been petitioned into bankruptcy) could have sued "unless by consent of the *proposed* defendant," except suits for the recovery of property under section 60 subdivision *b*, and section 67, subdivision *e*"; which exceptions do not affect the present case.

It does not except suits brought under sec. 70*e*. *Exceptio unius, etc.*

Of the many changes made in the Act of 1898 by that of 1903 we need only consider section 23, in connection with the exception added thereto and the concluding clause added to § 70*e*.

Subdivision *a* of section 23 gives circuit courts only such jurisdiction of an equity cause, "as distinguished

from proceedings in bankruptcy," as they might have had if no such proceedings had been instituted.

Subdivision *b* originally restricted suits by a trustee in the same way "unless by consent of the proposed defendant." This did not by name confer authority upon the district court to hear a case in equity; but it is held to be included in the word 'courts.' (178 U. S. 536.)

The only change made in this section by the act of 1903 is the addition "except suits for the recovery of property under § 60*b* and § 67*e*." (32 Stats., Pt. 1, pp. 798-9.)

The complainant sets forth no cause of action under sections 60*b*, or 67*e*, and his counsel disclaimed to the court any such purpose; hence, this exception does not affect the present case.

Thus section 23, with the exception eliminated, and section 70*e* are the only provisions of the act which give *any* right to bring a bill in equity.

As shown by the Congressional Record, the changes were made thus:

As introduced, and passed, in the House the Ray bill (H. R. 13679) did have the words 'and 70*e*' to conclude this exception added to § 23*b*. The House bill was referred to the Judiciary Committee, Jan. 5th, 1903. (36 Cong. Rec. 484.) A week from that day the bill and the amendments proposed to be made to it were reported back from the committee by Sen. Nelson, whose interest in the subject is well known. (*Id.* 663.) Having been printed with the amendments, it was "read for information" Jan. 20. (*Id.* 990.) Upon the following day, Jan. 21, 1903, it was taken up and each amendment, consecutively numbered, considered; the matter on this day being in the charge of the late Sen. Hoar. (*Id.* 1034)—At p. 1036, Part I, Vol. 36 of the Congressional Record, a little above the middle of the first column, this appears;—

"The next amendment was on page 7, line 23, before the word 'section' to insert 'and', and in the same line after the words 'subdivision *e*' to strike out 'and

section 70 subdivision *e*', so as to make Sec. 8 read; 'That subdivision *b* of section 23 of said act be, and the same is hereby, amended so as to read as follows;—

'*b*. Suits by the trustee shall only be brought *or prosecuted* in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted, unless by consent of the *proposed* defendant, except suits for the recovery of property under section sixty, subdivision *b*, and section sixty-seven, subdivision *e*.' (36 Cong. Rec. 1036.)

"The amendment was agreed to." *(Ibid.)*

The concluding clause of section 70e was left in the bill (H. R. 13679) as it came from the House and now appears on the statute book. The bill passed the Senate, *nem. con.*, that day. Jan. 26, 1903, the Senate amendments were "laid before the House" by Mr. Jenkins, chairman of the judiciary committee, who declared them "a decided improvement on the House bill." (36 Cong. Rec. 1270.) The bill was debated, conceded to have been improved, and all of the amendments concurred in by a vote of 101 to 22. *(Ibid.* 1370 to 1376.) The vote being to concur *en masse*.

Mr. Jenkins earnestly urged a general concurrence in all amendments, lest a conference should defeat the amendatory act for the final session of that Congress. *(Ib.)* Hence, it was, through haste and inadvertence, the concluding clause of § 70e, unnoticed in the Senate, remained in the statute.

One great obstacle to the continued existence of a bankrupt law has been jealousy of the federal courts, in some parts of the country. It was this feeling that led to the original section 23b; and it induced the striking out of 70e from the proposed amendment of that paragraph.

Though the views of an individual legislator cannot affect the construction of a statute, the general course of the debate, the report and action of the committee, and especially of one branch of the legislature in

amending the bill, are proper subjects of consideration.

C. & P. Co. v. Manning, 186 U. S. 245 citing *Blake v. Nat. Bks.* 23 Wall. 319;
Platt v. Un. Pac. 99 U. S. 64, and
Church v. U. S. 143 *Id.* 464.
Am. Co. v. Worthington, 141 *Id.* 474.
People v. Dalton, 158 N. Y. 184–5.

In Simpson v. Story, 145 Mass. 498, considering *(inter alia)* "the mode in which the embarrassing words were introduced as shown by the journals and records," and referring to the Congressional Record, the court held the word 'vessel' not to include a fishing-vessel; citing 23 Wall. 319, where the same language is used; also 91 U. S. 71, and 102 *Id.* 1.

Mut. Ins. v. Champlin, 21 F. R. 85.

Quoting the maxim *Ex antecedentibus et consequentibus fit optimus interpretatio* as 'one of the most important canons of construction', the Penn. court (per SHARSWOOD, J.) held that the generality of the right of recovery given by § 39 of the bankrupt act of 1867 must be restricted to the causes of action mentioned in § 35 of that act.

Hall v. Deshler, 71 Pa. St. 301.

Under the bankrupt law of 1841, this court (per GRIER, J.) conceding that the contention of the plaintiff in error would be correct if sec. 4 were construed independently of other provisions, held the generality of its language was restricted by that of the second section of the act.

Peck v. Jenness, 7 Howd. 622–3.

The matters covered by amended sections 60*b* and 67*e* relate to preferences and conveyances *intended* to defeat the object of the bankrupt act; and, therefore, preferably to be heard in the bankruptcy courts. Section 70*e* affects fraudulent conveyances running back through the period of the state's statute of limi-

tations, which are a fraud upon creditors, though made without reference to the bankrupt act. These long-past transactions it was considered by the Senate should be left to the state courts, unless the defendant was willing to submit them to the scrutiny of a federal tribunal—and the House acquiesced in this disposition of the matter.

This action on the part of congress led Mr. Hotchkiss, in his (4th) edition of Collier on Bankruptcy, 250, to "doubt whether any suit to recover property transferred more than four months before bankruptcy can be laid other than in the state court"—unless there is diversity of citizenship.'

E. B. ADAMS, D. J., carefully examining the subject, concluded no such action could be maintained in a federal court without defendant's consent.

Gregory v. Atkinson, 127 F. R. 183.
Brandenburg, 369, §578.

Judge HOLT apparently inclined to the same conclusion in sustaining our demurrer according to the superfluous statement in his certificate (Rec. 18 top) though the commencement of his opinion (*Id.* 15, fol. 27, bot.) indicates another ground; *i. e.* that the bill is not aimed at a transfer *by the bankrupt*, to which alone §70*e* relates.

No other reasonable purpose than that of denying or limiting jurisdiction can be assigned for striking out the words 'and section 70*e*' from the bill, leaving sections 60*b* and 67*e* as the only exceptions to the requisite consent prescribed by section 23*b* as the general rule for suits by a trustee in a federal court of the parties' residence.

Construing section 70*e* as giving absolute right to the courts of bankruptcy to entertain suits under sections 60*b* and 67*e*, and no right, or only one conditional upon the proposed defendant's consent or diverse citizenship, to take cognizance of other suits by the trustee, makes all three sections harmonious and the law consistent. No other construction does this.

In any view of section 70*s*, to maintain an equity suit under it by a trustee, these facts must be averred with the certainty and positiveness required in equity pleadings, viz:

(1.) A transfer *by the bankrupt*.

(2.) Such as his creditor might have avoided.

(3.) That the defendant is *not* a *bona fide* holder for value.

(4.) The bill must also aver that the *proposed* defendant has consented to the bringing and *prosecution* of the suit in the federal court.

The right being statutory, "before a party can avail himself of it, he must show *upon the record* that his is a case which comes within the provisions of the Statute". (95 U. S. 185 bot.)

Pac. Ry. v. Los Angeles, 194 *Id.*, 118 mid.

An examination of the bill discloses that it does not positively, nor properly aver any one of the necessary jurisdictional facts.

IV.

Analysis of the bill.

"However presented, the question of jurisdiction depends primarily upon the allegations of the bill" (194 U. S. 118 mid.) and it is immaterial in what form, by demurrer or motion, the failure to state a case is called to the attention of the court. *(Ib.)* Chase v. Palmer, 23 Mo. 345 per WHITMAN, C. J.

We shall refer to the defective statements (and the omissions) of the bill only as related to their insufficiency to show jurisdiction; meeting the criticism of counsel below that some (not all) of our objections merely indicated 'want of equity' with the suggestion

that, in a court of equity (especially one of limited jurisdiction) "want of equity is want of jurisdiction."
Richards v. Lake Sh. 124 Ills. 521.

The presumption against jurisdiction accompanies the search for it throughout the statements of the bill; so does the one rule which Welsford says is always strictly applied, "that the pleading will be construed most strongly against the party pleading" (Wels. Eq. Pl. 10) because, as Farren states it, the complainant cannot be supposed to have any greater right, or the defendant any more guilt, than the pleadings (thus construed) set forth. (Bill in Ch. 1, 2.) The application of this rule is equally well-known, universal and stringent as the rule itself, viz.;—that where the pleading is ambiguous and susceptible of two interpretations, the demurrant may adopt that most favorable to himself and most against the plaintiff's interest. (Wels. 126 mid.; Mitf. 128 note 1.)
Vernon v. Vernon, 2 Myl. & Cr. 145.

"No fact can be assumed in favor of the party pleading, except it be directly averred, or arises by necessary inference. On the contrary, the construction shall be taken most strongly against him, as it is to be intended that every person states his case as favorably to himself as he can." Griswold v. Mather, 5 Conn. 438 bottom, per HOSMER, C. J.
Clark v. Dillon, 97 N. Y. 373, bot.

It will be noticed that every allegation of the bill seeking to affect the defendants is "stated on information and belief." (Rec. 2, top.)

In the "Statement" of his brief (2 mid.) appellant's counsel assumes many things to be "admitted by the demurrers" which we do not thereby admit, because not "well pleaded", being mere conclusions, argumentative, bad for duplicity, and otherwise objectionable, not stating facts.

As was said per DAVIS, J.; "The statements of this bill are vague and uncertain, frequently argumentative,

very rarely plain and direct. The whole bill lacks definiteness. Agreements, friendly arrangements, understandings and devices are freely spoken of, but the character of the agreements and the nature of the devices we do not learn." 2 Black, 587.)

The adjectives and epithets of the bill are not admitted by the demurrer; the Court ignores them. Mere 'charges' of fraud "make not the slightest impression upon the mind of the Court upon the hearing of a demurrer."

Nesbitt v. Berridge, 8 Law T. (N. S.) 77.
Fogg v. Blair, 139 U. S. 127.
Kent v. Lake, 144 *Id.* 91.
Preston v. Smith, 26 F. R. 884 (BREWER, J.)

The first three paragraphs of the bill merely state the parties thereto. (Rec. 2.)

In order to affect the other defendants with the doings of Mr. Wenman, the fourth paragraph commences; "4. In and about *some* OR all of the matters," etc., set forth as done by him, Mr. Wenman "*acted*" as the agent, &c., of Messrs. Fish and Boldt, who were his principals "with respect to *some* OR all of his dealings" with Dresser & Co., "and with respect to *some* OR all of the dealings of Wenman with *any and all* of the defendants in this suit, as in this bill set forth, and *some* OR all of the moneys paid to him were OR should have been paid over," less his compensation, "to his said principals." (Rec. 2, fol. 3, par. 4.)

The probable purpose of these ineffective allegations is to connect the other defendants with the warehouse receipts issued to Dresser & Co., which they 'in turn' negotiated; "*some* to the defendant Wenman for himself OR for the defendants Fish and Boldt," etc. (Rec. 4, fols. 6, 7), and to "others."

In par. 17 of the bill, it is said all the defendants, when they took these warehouse receipts, "knew, OR ought to have known" matters supposed to affect their validity. (Rec. 5 top.)

Such allegations in the alternative state no fact.

"To state in the alternative is to state neither the one nor the other fact." It results in a mutual exclusion.

Cronin v. Crooks, 143 N. Y. 354.
U. S. v. McCreery, 62 U. S. Ap. 337.
Brown v. Keene, 8 Pet. *115.

"It is no answer to an objection to averments made in the alternative to say that, if either averment is true, the plaintiff has alleged a cause of action." Jamison v. King, 50 Cal. 136.
Potter v. Harman, 8 *Id.* 623, FIELD, C. J.

These last allegations do not affect the good faith of the defendants, which is affirmatively established by other statements of the bill.

The fifth and sixth paragraphs state that Dresser & Co., at least as early as Sept. 7, 1902, were 'insolvent' (*i. e.* in the ordinary, not statutory, meaning of that word—*solvere ad diem*) and only able to continue in business by borrowing large sums—not an uncommon mercantile condition (Rec. 3, par. 6). The rest of the sentence "to secure which it became necessary to pledge the goods," etc., concealing "the *fact*" of such pledge from unsecured creditors (*Id.*) is merely an argumentative inference of the pleader; shown to be fallacious by the statement of the next paragraph (7) that a lease was given; not claimed to be unrecorded. (17 N. Y. 580; p. 582.)

The seventh paragraph (Rec. 3, fol. 4) says that "for the purpose of pledging these goods with certain of their creditors" (unnamed) "without the knowledge of their other creditors" Dresser & Co. entered into an arrangement with the Security Warehousing Co. whereby the firm leased to the Warehousing Co. the store on Greene Street in order that it might be one of this defendant's warehouses and all the goods in it were delivered to this defendant for storage therein (Rec. 3, fols. 4, 5).

This paragraph is replete with useless adjectives and imputations which we have ignored, as Judge HOLT did (Rec. 16) and as this Court will.

It commences with "the ascription of a purpose," not admitted by demurrer (21 Wall. 497 bottom). It calls the lease "an *alleged* lease" and in his brief (p. 3 top) plaintiff's counsel says "a *pretended* lease," and the paragraph concludes by designating the store as a "pretended warehouse" (Rec. 5, fol. 5).

"The bill alleges and, of course, by such allegation admits the entry by the City of Alton of a 'pretended decree.' * * * A pretended decree is a decree apparently or *prima facie* valid; and the complainant having admitted the entry of such decree, the burden was clearly upon him to show that such decree was invalid, an unreality, a pretence."

Bowman v. Ash, 148 Ills. 667.

The bill lays stress upon the omission by Dresser & Co. to notify "other creditors" of these loans and pledges; as if it were the customary thing for merchants borrowing from banks or individuals, on or without collateral, to send around to everybody they owe notice of the accommodation obtained!

In law, *the record of the lease was notice to all the world* (See last clause of § 90, in note to pp. 4 and 5 appellant's brief).

Van Heusen v. Radcliff, 17 N. Y. 580.

After thus conceding (in par. 7) a delivery for storage, the statements at the beginning of par. 8, that there was no change of custody of the goods, and at the beginning of par. 9, that this defendant exercised no supervision or control are refuted by the further statement of this last-named paragraph that it did appoint a custodian, and tagged the goods with its name (Rec. 3, fols. 5, 6). That they were not so affixed as to identify the goods covered by the warehouse receipts is the argumentative conclusion of the pleader.

That the custodian was an employee of the pledgors did not affect the validity of the pledge.

Sumner v. Hamlett, 12 Pick. 76, per Shaw, C. J.
Combs v. Tuchelt, 24 Minn. 423.
1st N. Bk. v. Pa. Tr. Co. 60 C. C. A. 100.
Ky. Furnace v. Cy. N. Bk. 75 So. W. Rep., 848.
McComber v. Parker, 14 Pick. 497.

The tenth paragraph (Rec. 4 top) of the bill recites that, *after* the storing of the goods with it, this defendant prepared warehouse receipts (which the pleader, for the sake of its greater brevity, calls "security instruments") in the usual form of such documents" and representing that certain goods had been stored with it at its warehouse, Nos. 15, 17 Greene Street," etc. *(Id.)*. The receipts giving "the quality, value and amount" of the goods stored were sufficient to sustain the lien, without adding marks and numbers; the rest of par. II. (Rec. 4, fol. 6) being uncertain, argumentative and merely stating a conclusion. That such receipts suffice, see

N. Y. Security v. Lipman, 157 N. Y. 551, citing Blydenstein v. N. Y. Security, 67 F. R. 469.

See, also, the form of the receipt in 1st N. Bk. v. Dean, 137 N. Y. 113.

The twelfth paragraph (Rec. 4, fol. 6) states that the warehouse receipts were delivered to Dresser & Co., and thereafterwards were negotiated or "delivered in turn" to the several defendants and to "other parties" to secure loans *then* made. All those outstanding March 9, 1903, were in the hands of the defendants, which is the ground of their being made defendants—not because they did aught different from those "others" whose receipts happened to have been taken up prior to that date.

The succeeding paragraphs allege inconsequential circumstances, having no bearing upon any such suit

as sec. 70*e*, in any aspect, authorizes a trustee to bring in a district court. They relate to no transfer or act of the bankrupts.

V.

§70e. Transfer by bankrupt.

The statutory essentials to jurisdiction under this section, as already noticed *(ante*, p. 12) are (1) a transfer by the bankrupt; (2) which any creditor might have avoided; (3) of property or value not held by a *bona fide* holder.

In the case at bar, the only transfers by the bankrupts, Dresser & Co., were the lease to the Security Warehousing Co. and the negotiation of the warehouse receipts issued by that company against the goods stored with it.

Except by the prefix 'alleged,' the lease is not assailed by the bill. The complainant does not pray to have it adjudged void. (Rec. 8 top.) He states no ground for invalidating it; does not deny it was recorded conformably to law. His attack is upon the warehouse receipts and (especially) upon the action of the receivers after adjudication, with which the bankrupts had naught to do.

Yet it was the lease which created the original lien upon the goods stored upon the leased premises; or, rather, the deposit of the goods in the warehouse. The warehouse receipts increased the sum for which they were held, but did not create the right to detain them until whatever might be due was paid. They transferred the right to the goods on payment of the warehouse company's lien.

At common law, the deposit created the general lien; recognized by decisions and sustained by statute in New York, as in other states, 9 Wend. 268.

Brooks v. Hanover N. B. 26 F. R. 302 bot.

The statute gives a general lien upon all goods of the same owner for charges upon them; if some are removed, charges upon them are a lien upon those not removed.

Stallman v. Kimberly, 121 N. Y. 393, Affirming, 53 Hun, 531.

A further lien, for advances, &c., may attach by contract; like our lease, for instance.

Warehouse receipts are negotiable (26 F. R. 302, bot.).

The bill shows (Rec. 2, fol. 3, par. 2) The Security *Warehousing* Co. to be a lawfully-organized corporation of New York, which took a lease of Nos. 15-17 Greene St. as "*one* of its warehouses" and that all of Dresser & Co.'s goods in it had been delivered to this company for storage on those premises. (*Id.* 3, fol. 5.) The Warehousing Co. thereafter issued warehouse-receipts in the usual form (*Id.* 4, par. 10), some of which, by some 'turn' of negotiation, came into the hands of some of the defendants and other persons to secure loans. (*Ibid.* par. 12.) In other words, they were negotiated in due course, for value.

We deny that such receipts, issued by a regular warehouseman in customary form, and negotiated for value, come within the terms or meaning of Sec. 90, found at p. 4 of appellant's brief, or are expected to be recorded. It is only instruments which are subjects of recording acts (like our lease) that come within that section. Neither the Court of Appeals, nor any other New York tribunal, have held ordinary warehouse receipts within the contemplation of this law. The very cases cited by appellant (*ubi sup.*) refute his statement.

In Yeuni v. McNamee, 45 N. Y. 614, the decision rests wholly upon the ground that the instrument "was *not* a warehouse receipt." (Id. 622, end of Opin.) "It is obvious that, as between Stokes and Chapman, the receipt was a mere nullity." (*Id.* 619, mid.) The bill herein states, as the ground of going into equity, that

the warehouse receipts held by "the various defendants" are *valid* as between them and Dresser & Co. (Rec. 6, 7; par. 28.)

Button v. Rathbone, 126 N. Y. 187, also cited *(ubi sup.)*, the case of a mortgage, has no bearing on the present case to the point for which appellant cites it; but it does hold that "creditors" in the cited section 90, refers exclusively to judgment creditors—one "armed with some process" as distinguished from "a mere creditor at large." (126 N. Y. 191 middle.)

Van Deusen v. Radcliff, 17 N. Y. 584.
Jones v. Graham, 77 *Id.* 628.
Stephens v. Meriden, 160 *Id.* 178.
Sheldon v. Wickham, 161 *Id.* 503 bot.

Citing these cases, the Circuit Court of Appeals for the Second Circuit arrived at the logical conclusion that a trustee in bankruptcy could avoid a transfer only to the extent that a judgment creditor could.

N. Y. Econom. Printg. Co. 49 C. C. A. 133.

The same Court followed that decision in affirming the Kellogg case (112 F. R. 52) which was affirmed by this Court, on the same ground, *sub nomine*

Hewit v. Berlin, 194 U. S. 302-3.
Thompson v. Fairbanks, 196 *Id.* 526,
Citing Garcewich, 115 F. R. 99 & citations.
53 C. C. A. 510.

The bill does not state (could not, truly) *that there was* in existence, at the date of adjudication, *any creditor of Dresser & Co.* "armed with legal *process*," and thus *qualified to raise any question under section 90* of the State law, even if that applies to warehouse receipts.

VI.

Bona fide holder.

The third statutory element is that the recovery must be sought from one not a *bona fide* holder for value.

The trustee can avoid a transfer which any creditor could, and recover the property, or its value from the transferee, "*unless he was a bona fide holder for value* prior to the date of the adjudication. Such property may be recovered, or its value collected, from whoever may have received it EXCEPT a *bona fide* holder for value." (Sec. 70*e*.)

"For the purpose of *such* recovery," [from one not holding *bona fide*—and for that purpose only] the courts of bankruptcy are given jurisdiction.

This paragraph *e* being intended to define a statutory jurisdiction, every element of this definition must be stated in a complaint asking a hearing in this court, including the bad faith of, or non-payment of value by, the defendant. Every holder in good faith, for value, is immune from attack by the trustee; hence, an averment (in effect) that the defendant is *not* such holder is an averment vitally necessary to sustain jurisdiction against a demurrer. The trustee can drag into court no one against whom he is unwilling to make this charge.

The presumption against jurisdiction, in addition to the ordinary rules of pleading, require the trustee to make this charge, affirmative in fact, even if negative in form. (Potter's Dwarris, 119; 1 Kent, Com. 468.)

As Mr. Endlich says;—

"The effect of an exception which is part of the enacting clause, and is of general application is to restrict from application to the matters excepted the general language of the section or statute which, without the exception, would have included the same", adding in a note;—"It follows that in an action based on the statute *the pleadings must negative an exception*

contained in the enacting clause, as otherwise *it cannot be seen that the general language of the statute embraces the particular case*". Endlich on Stats. Sec. 184, p. 253. He explains "enacting clause" to mean the body of the statute. (15 Pet. § * 445.)

Wayman v. Southard, 10 W. * 30.

Facts must be averred showing that a defendant is not within the exception of the statute. Whatever is necessary to give a right of action to the plaintiff must be averred.

Walker v. Johnson, 2 McLean, 92.

The following excerpt from Judge McLEAN'S opinion shows the pertinency of his decision to the case at bar:

"The statute does not originate the cause of action; but it protects the defendant from an action unless he be *charged* with fraud, negligence or waste. Now, is this matter of defence to be set up by the defendant, or is it *inseparably connected with the plaintiff's case?* An executor or administrator can only be made personally responsible by suggesting a devastavit; and this suggestion must also be made in the declaration. Now, in the present case, the defendant is not liable to be sued, unless fraud, negligence or waste be *charged.*"

Walker v. Johnson, 2 McL. 96, 97.

Clough v. Shepherd, 31 N. H. 494,

where that court say the principle, though more often declared in penal actions, is equally applicable to civil cases; citing Vavasour v. Ormod, 6 B. & C. 431 (debt upon a lease) and other authorities.

See the following bankruptcy cases: Bellah, 116 F. R. 69; Pilger, 118 *Id.* 206; Brett, 130 *Id.* 983; Taylor, 42 C. C. A. 1.

The Maine Court said:—

"This is a suit in equity. In regard to such suits, the jurisdiction of this court is limited and specific. Even in courts of general equity jurisdiction, a bill in equity must state a cause within the appropriate jurisdiction as a court of equity"; and within such court's limitations, of course, whatever they may be.

Chase v. Palmer, 23 Me. 345; Whitman, C. J.

Ex p. Smith, 94 U. S. 456, bot.

Wellsboro' v. R. R. 76 N. Y. 182.

Where jurisdiction depends upon diverse citizenship, the averments, though affirmative in form, are really only to negative the idea of a common citizenship. Conversely, it is the existence of bad faith that is to be proved by plaintiff (21 Wall. 359) although, in form, alleging the want of good faith.

This allegation is as vital as that of citizenship where jurisdiction depends upon that fact.

The burden of proving bad faith is on assailant of taker's title; hence, he must allege it. Hotchkiss v. Nat. Bks. 21 Wall. 359 and citations.

Under those provisions relating to preferences, or fraudulent conveyances, within four or six months, it has been said repeatedly that the transferree's "cause to believe" the bankrupt's purpose to be to evade the law must be alleged. This is equivalent to '*bona fide*' in section 70*e*—except the proof of bad faith would have to be more stringent under this latter section.

Kaufman v. Tredway, 195 U. S. 271.

The bill nowhere charges that defendants were not holders for value. On the contrary, it declares the transaction which the trustee attacks, and the warehouse receipts issued under it, were for the purpose of borrowing large sums of money (Rec. pp. 3 and 4, Pars. 6, 7 and 12). This last paragraph (12) says these receipts were delivered "to secure certain loans." (Rec. 4, fol. 7.)

Bad faith, or the absence of good faith, is nowhere charged. The statement that defendants took them "to *secure*" present loans certainly leads to the inference of good faith.

It is shown that Dresser & Co. gave a lease to the Security Warehousing Co.; that a custodian of the goods was designated by this Company; it tagged the goods; and thereupon it issued these warehouse receipts, "after" the storage of the goods. (Rec. 4, top, par. 10.) Subsequent neglect or inattention on the

part of the Warehousing Co., or its custodian, could not invalidate these instruments, taken in good faith and for value at their inception, or afterwards. Suppose the methods adopted were ultimately found to be injudicious and insufficient for protection of the goods; that does not make them void *ab initio*.

That the Warehouse Co. let Dresser & Co. have money on these receipts is evidence that, even if careless, it acted in good faith, and without knowledge that any removal of goods by Dresser & Co. was permitted by its custodian, if such be the fact.

There is no claim that any other defendant had knowledge or notice of any one of the recited circumstances, even if they occurred as stated. Indeed, *it is not alleged that the Security Warehousing Co. had any such knowledge or notice.* There is only the general, insufficient, allegation that "the defendants knew OR *ought to have known*" the matters mentioned.

That such an alternative averment states neither fact has been already shown. (See *ante*, p. 15)

If the alternative averment did not neutralize itself, we could claim that it simply averred the defendants "*ought* to have known" the indicated matters—which is mere opinion, not fact; a conclusion of law, not admitted by the demurrer; which admits only facts "positively alleged; not every fanciful pretence suggested". Baker v. Booker, 6 Price, 581.

The fair implication from the statement that defendants "ought to have known" is that (although, in plaintiff's opinion, they 'ought') they did *not* know. This law imposes no penalty upon ignorance, unless a creditor has reasonable cause to believe; which implies a knowledge of circumstances naturally inducing belief. Here, the utmost the allegation can be supposed to imply is that defendants 'ought' to (but did not) know the circumstances. The averment of "satisfactory cause" held not to be equivalent to "reasonable cause". Smith v. Bean, 130 Mass. 298.

According to the ordinary course of business, it is seldom the case that the holder of a warehouse receipt

is cognizant of all that is done at the warehouse. If we can venture to offer a suggestion as to the individual defendants, it is not reasonable to suppose that they took these "security instruments" for their loans knowing or believing all those matters to be true which are charged in this bill.

This Court, per FIELD, J., said;

"A suspicion that there is a defect in title in the holder, or a knowledge of circumstances that might excite suspicion in the mind of a cautious person, or *even gross negligence* at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, *which implies guilty knowledge* or wilful ignorance, and the burden of proof lies on the assailant of the title."

Hotchkiss v. Nat. Bks. 21 Wall. 359.
Murray v. Lardner, 2 *Id.* 110.
Jacobs v. Morrison, 136 N. Y. 104–5.

Warehouse receipts have been so generally issued and transferred in recent years that they have become entitled to the privileges of negotiable paper; but this is immaterial, as section 70*e* gives every honest transferee the same protection.

New York State law does the same; as will be seen by reference to the "Personal Property Act."

SECTION 29. This article does not affect or impair the title of a purchaser or *incumbrancer* for a valuable consideration, unless it appear that such purchaser or incumbrancer had *previous* notice of the fraudulent intent of his *immediate* vendor, or of the fraud rendering void the title of *such* vendor."

So no creditor in this state could have shown a cause of action without averring *mala fides* of this character.

The bill (4, par. 12) does not indicate the "immediate vendor" of the defendants.

VII.

Consent of the proposed defendant.

It is not the defendant's consent that is made a condition precedent to jurisdiction, but that of the person whom the trustee preposes to make a defendant.

A 'proposed' defendant is not one *in esse*, but a person intended to be made such *in futuro*. (27 App. Div. 110.) The purpose to sue him in a bankruptcy court must be communicated, and assented to by him, *before* service of the summons; for that service makes him, *eo instanti*, a defendant, calling him into court to make *some* defense. (184 U. S. 26.)

Unless obvious necessity compels, no statutory word should be rejected as insensible or superfluous; but should be taken according to its ordinary meaning. (16 Howd. 261.) This word 'proposed', inserted in the original, and retained in the amended, act cannot have been employed inadvertently. It would have been simpler to have omitted it, if the consent of one already sued had been intended; but such was not the intention. It was not designed that the dockets of the federal courts should be lumbered up with cases in regard to which it was problematical, at the time of their entry, whether jurisdiction could be retained. The intention was to transfer from the plaintiff to the defendant the election of the tribunal in which such litigation should be conducted. It limited the jurisdiction of federal courts to such persons, not otherwise amenable to it, as had consented thereto; Congress having power to impose any limitation seeming to it good.

If, then, this be a jurisdictional fact, it should be alleged in the complaint; and the present one contains no such allegation.

Of course, if a defendant goes on to litigate the merits, he estops himself from making the objection; no man can complain of a judgment, or proceeding, to which he has assented. (Thompson v. Perkins, 57 Me. 290.) *Ex. gr.*, a petitioner for the location of a way

cannot have the proceedings quashed as irregular; nor can the promoter of an act contest its constitutionality. *Volenti non*, etc.

Section 23 does not say simply no suit shall be *brought* without the consent of the proposed defendant; it adds "*or prosecuted.*" Consent to the *prosecution* of a suit requires something more than merely appearing to demur.

The Bardes case went up on a demurrer to the jurisdiction. (178 U. S. 525 mid.)

In re Thomson, 112 F. R. 946.
Donnelly v. Cordage Co. 66 *Id.* 613.

In St. Louis Ry. v. McBride, 141 U. S. 127 (as in many prior cases) it was held that, by appearing generally and *pleading to the merits* one waives the objection that he is sued out of his district (*Id.*, 131).

Referring to this case, LOWELL, D. J., cites Louv. Tr. Co. vs. Cominger, 184 U. S., 26, as an authoritative determination that the consent required by Sec. 23 must be *more complete* than it was in St. Louis v. Mc-Bride.

In re Mitchie, 116 Fed. R. 725.
In re Steuer, 104 *Id.* 977.
Hemley-Hutchinson, 105 Id. 909,
also in 5 Am. Bky. Rep. 569.

A "voluntary" appearance is one without service of summons, 17 Howd., 424; 10 Wall. 327.

A *defect* in service of summons may be waived; but *illegality* of service "is considered as waived only when the defendant, without having insisted upon it, pleads *in the first instance* to the merits."

Harkness v. Hyde, 98 U. S. 479.
Mex. Ry. v. Pinckney, 149 *Id.* 209, mid.
Reinstadtler v. Reeves, 33 F. R. 310, q. v.
Miller Co. v. Carpenter, 34 Id. 434.

A service in ordinary *form* compels defendant to appear; he may then elect to plead or demur, etc.

Gould v. Evansville, 91 U. S. 527; Cominger case, 184 *Id.* 26.

'Consent' implies concurrence; affirmative action.

De Klyn v. Gould, 165 N. Y. 288 Mid.
Cocks v. Gooch, 52 Tenn. 310.
Geddes v. Bowden, 19 So. Car. 7.
Aull v. Columbia, 42 *Id.* 436.

Consent not merely that an action may be brought, but also prosecuted is the condition.

The eleventh amendment to the Constitution contains a similar phrase; thus construed by this Court, per MARSHALL, C. J.;

"To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute a suit according to the ordinary acceptation of language is to continue that demand."

Cohens v. Va. 6 Wheat. 408.
Knowlton v. Read, 11 N. J. L. 321, quoting 1 Pa. 360.
Marryott v. Young, 33 N. J. L. 337, bot.

Our demurrer to the jurisdiction, filed on the first day upon which your rules required us to plead, indicated our refusal to consent to the bringing and to the further prosecution of the plaintiff's demand in the district court.

VIII.

Reply to plaintiff's points.

Neither the learned judge nor the defendants are impaled upon either horn of the plaintiff's "dilemma." *(His Brief, p. 10).*

If the property were in the possession of the court there would be no ground for bringing a plenary bill in equity, especially without defendant's consent. Such possession, if actually or constructively retained (as the plaintiff erroneously assumes) would obviate

all necessity for a bill and allow resort to proceedings in bankruptcy, as *in rem*.

A mere transfer by the bankrupts, more than four mos. prior to bankruptcy, would not suffice to give jurisdiction, without the consent of the defendant; nor with it, unless the bill showed affirmatively that the transfer sought to be avoided was by the bankrupt; of a character making it open to attack by an existing qualified creditor; and recovery sought from one not a *bona fide* holder for value. If a preference, that would be immaterial.

Plaintiff's two propositions (His brief, p. 11) antagonize one another.

If his first proposition, on which he has always strenuously insisted—that the property was in the custody of the court—were correct, it would upset his second—of jurisdiction to maintain a plenary bill under sec. 70*e*. That manifestly contemplates a subject-matter examinable, at the trustee's election, either in the state or federal court; whereas no state court would have authority to determine status or title as to goods in the custody of a court of bankruptcy. (178 U. S. 542.)

The suit under that section is expressly to "recover" the *res* or its value; language inapplicable to things already in the possession of the Court.

Though both of plaintiff's propositions cannot be right, both can be (and are) wrong.

Throughout this controversy, plaintiff has refused to recognize the distinction between a plenary bill in equity and proceedings in bankruptcy.

At the commencement of his first 'point' (His brief, 13) the appellant states his 'contention' to be "that this case falls within the class of cases represented by White vs. Schloerb" (a proceeding in bankruptcy) "and *not* within Bardes vs. Bank"—a plenary bill in equity.

Thereby he excludes himself from sec. 70*e*, without bringing himself within any other provision of the

bankruptcy act; for that section confines itself to matters of *concurrent* jurisdiction.

That the bill alleged possession by Dresser & Co. and by the receivers only argumentatively, refuting it by its allegations of specific facts has been already noticed *(ante*, p. 16); but we will add that these recited *facts* support Judge HOLT'S statement as to possession, criticised at pp. 13, 14 of appellant's brief.

It will be borne in mind that Mr. McKenzie was made an assignee under a voluntary assignment two days before receivers in bankruptcy were appointed, so there could be no possession by Dresser & Co. at this later date. (Rec. 2, fol. 4.)

It is useless to notice citations relating to the conduct or rights of receivers operating railroads, etc. (Appellant's brief, pp. 14, 15.)

To the statement, on p. 16, that "a third party states it has issued warehouse-receipts," we reply that the plaintiff's bill states that this defendant had done that thing, more than four months before bankruptcy. (Rec. 4, par. 10.)

The statements on p. 17 of appellant's brief are strikingly incorrect; the trustee did not appeal to the court to decide whether the receivers had acted properly; without making either of them a party, he sues the defendants for *the value* of goods that he says have been sold and their proceeds distributed.

The 'reply' he puts into the mouth of the court is ludicrously variant from what Judge HOLT really said and appellant's brief, foot of p. 18. The suppositious 'reply' commences;—"It is true that this court did take into its custody property of great value" etc. (Brief, 17.) Judge HOLT'S opinion is that this property never was *in custodia legis*. (Rec. 16, fol. 28.)

At the top of p. 19 of his brief appellant says "The defendants are not *bona fide* holders;" but *he failed to say so in the bill*, as already noticed. *(Ante*, p. 21.)

Not making the lease an exhibit, he has no ground for asserting that the defendants were "not *bona fide* holders of the accounts" (Brief, p. 19) and he errs in

stating that "the bill discloses the fact that the accounts collected had nothing to do with the silk pledged." *(Ibid.)* The bill shows nothing of the kind. On the contrary, it is easily inferable from its par. 22 (Rec. 5, 6) that the monies collected did represent the goods sold.

If warehoused silks were sold, the receipt-holders, and this defendant under its lease, had an equitable lien on the proceeds. Nichols v. Higgins, 19 U. S. Ap 148.

Hovey v. Elliott, 118 N. Y. 136-7.

"A prior lien gives a prior claim which is entitled to prior satisfaction out of the subject it binds." Quoted in 3 How. 332 from 12 Wh. 180.

NOT A SINGLE ONE OF THE NUMEROUS BANKRUPTCY CASES CITED BY THE APPELLANT ON THE QUESTION OF JURISDICTION SUPPORTS HIS CONTENTION as to the asserted right to contest the title of an adversary possessor of goods in the district Court by a plenary bill without the defendant's consent; not one sustains his contention as to the property being *in custodia legis* under our state of facts except, possibly, *in re* Leeds Woolen Mills, 129 F. R. 922 (*a bankruptcy proceeding*) extensively quoted from by plaintiff in the Court below, but which was unanimously reversed by the Circuit Court of Appeals, composed of LURTON, SEVERENS and RICHARDS, C. Js. (opinion by the senior judge) *sub nomine*

Hinds v. Moore, 134 F. R. 222.

The opinion not only reversed Judge HAMMOND'S ruling, but overset the theory upon which it was based. (*Ibid.*)

The general allegations of a trust (Rec. 6, 7; pars. 26 and 31) amount to nothing. No 'trust' attaches until the subject of it comes into the hands of the trustee.

Murray v. Clarendon, L. R., 9 Eq. 18.
Fogg v. Blair, 133 U. S. 534.
Hollins v. Iron Co. 150 *Id.* 787.

Every bankruptcy decision cited by appellant is either made in a bankruptcy proceeding, or relates to a preference within four months.

He refuses to recognize the distinction between such cases and those brought into court by a plenary bill in equity, although distinctly stated by the Circuit Court of Appeals in the Second Circuit, as well as by the Supreme Court.

In the Kellogg case, the opinion, per TOWNSEND, C. J. (LACOMBE and COXE, JJ. concurring) says :—

> In view of the Supreme Court decisions, and many others, "it would seem that the controversies in relation to the bankrupt estate which—by reason of the limitations referred to in the clause 'except as herein otherwise provided for'—do *not* come within the jurisdiction of the bankruptcy courts are those *where the trustee must bring an independent suit to assert title to money or property not in the possession or control of the trustee.*"

In re Kellogg, 121 F. R. at p. 336.
IN RE ANDRE, per WALLACE, C. J. ;—13 Am. Bky. Rep. 132.
Kohn, 134 F. R. 557 (VII Circuit).
Dorsheimer v. Ott, *Id.* 740 (III Circuit).
Beach v. Macon, 116 *Id.* 143 (V Circuit).

The silks in question and their proceeds are not, and never were, "in the possession or control of the trustee." Therefore, he has to bring this "independent suit to assert title" to their proceeds. There never was any property or fund in Court. Throughout, the claims of these defendants have been adversary claims as to property the Security Warehousing Company had in its possession, and sold.

IX.

Conclusion.

The plaintiff, and we too, failed to find a single instance where such a suit as this has been sustained.

We do not reiterate, while we adhere to, the several objections to the bill as not stating the statutory facts requisite to give the Court jurisdiction.

The judgment of the court below should be affirmed.

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